



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 441 OF 2008

IN THE MATTER OF THE ESTATE OF JACOB MULILI alias JACOB MUINDI MULILI (DECEASED).

-AND-

1. RAEL MBITHE MUINDI

2. ALEX NZUKI MUINDI.....PETITIONER/RESPONDENTS

-AND-

GRACE MUNYOO MBITHUKA.....APPLICANT

RULING

1. By a Summons for Revocation of Grant dated 2nd November, 2018, the applicant herein, **Grace Munyoo Mbithuka**, seeks an order that the Confirmed Grant of Letters of Administration issued to **Rael Mbithe Muindi** and **Alex Nzuki Muindi** on 30th March, 2010 be revoked and a fresh one be issued giving Land Parcel No. Makueni/Kivani/269 to the applicant.

2. According to the applicant, she is a daughter and legal representative of Ngeli **Mulwa Nzomo** (hereinafter referred to as “**Ngeli**”) while the petitioner/respondents are the legal representatives of the late **Jacob Mulili alias Jacob Muindi Mulili** (deceased -hereinafter referred to as “the deceased”) whose estate is the subject matter in the succession proceedings herein.

3. The applicant deposed that during the lifetime of both the deceased herein and **Ngeli** (the applicant’s father), **Ngeli** sued the deceased in Kilungu District Magistrate’s Court Civil Suit No. 17 of 1991 claiming an order of specific performance directing the deceased to transfer land parcel No. 269 – Kivani Adjudication Section, which the deceased herein had earlier sold to **Ngeli** for a sum of Kshs. 44,000.00. In response thereto, the deceased wrote to the said court admitting **Ngeli**’s said claim and upon hearing both parties, the aforesaid court allowed **Ngeli**’s claim and ordered the deceased herein (**Jacob M. Mulili**) to transfer the aforesaid land to **Ngeli**. However, both the deceased and **Ngeli** died before transfer of the aforesaid land could be affected in favour of the applicant’s said father (**Ngeli**).

4. It was averred that by pronouncing its aforesaid Judgement on 30th May, 1991, the aforesaid court gave a final determination on the rights of the parties before it regarding the aforesaid parcel of land and found that (as admitted by the deceased herein) the aforesaid land belonged to **Ngeli**, and ordered the deceased herein (**Jacob M. Mulili**) to transfer the same to him, a judgement which was never set aside or varied, either on appeal or otherwise.

5. According to the applicant, the aforesaid land parcel No.269 - Kivani Adjudication Section (which was subsequently registered as land parcel No. Makueni/Kivani/269) became the property/a free property of **Ngeli** from the date of the Court’s said Judgement (30/5/1991) and ceased to be the property of the deceased herein from the said date; though formal transfer of the land was yet to be done. Accordingly, on the death of the deceased herein, the aforesaid parcel of land did not form part of his estate. Therefore, on petitioning this Court for a grant of letters of administration Intestate of the deceased’s estate, the petitioners/respondents were under a legal duty/obligation to make a disclosure that the aforesaid parcel of land was, by dint of the aforesaid court’s Judgement, not part of the deceased’s estate, and was supposed to be given and/or transmitted to **Ngeli** and/or his estate. However, the petitioners/respondents did not make the foregoing disclosure but instead concealed the foregoing fact and went ahead to have the aforesaid parcel of land transmitted to themselves, an action the applicant contended points to both concealment of material facts and fraud on the part of the petitioner/respondents.

6. It was submitted on behalf of the applicant that a court’s record is a public record and this Honourable Court has inherent power and Jurisdiction to call for the Original Court record in Kilungu DMCCC No. 17 of 1991 if the need to verify the authenticity of the said Court’s Proceedings and Judgement arises. According to her, revocation of the confirmed grant will re-open the proceedings herein and give the applicant an opportunity to establish her interest in the deceased’s estate hence the applicant cannot be locked out from the seat of justice with technical allegations of having annexed photocopies of the Kilungu Court’s Proceedings and Judgement, and of having failed to annex

copies of pleadings filed in the said court. Once the confirmed grant is revoked, the applicant will have an opportunity to demonstrate to this Honourable Court that she, indeed, has a legally sustainable interest in the deceased's estate.

7. It was submitted that revocation of the confirmed grant will lead to fresh hearing and consideration of the Summons for Confirmation of Grant which led to issuance of the impugned confirmed grant. The applicant herein will have an opportunity to present her protest to the confirmation, which this Honourable Court will then consider and make a finding thereon. However, unless and until the revocation sought is done, the applicant cannot be heard on her interest in the deceased's estate.

8. According to the Applicant, the petitioner/respondents' allegation that the applicant's claim should "go to the Environment and Land Court" is without basis in that all matters relating to a deceased person's estate and distribution thereof fall under the Jurisdiction of this Honourable Court. It matters not whether or not the estate is made up of movable or immovable (landed) property.

9. It was the applicant's position that the applicant's application herein meets the threshold for revocation of a (confirmed) grant as the applicant has demonstrated fraud and concealment of a material fact, whether this was done through ignorance or inadvertence on the part of the petitioner/respondents. She prayed that the applicant's application herein be allowed as prayed, and that this Honourable Court do give directions that the petitioners' Summons for Confirmation herein be fixed for hearing, with the applicant filing a protest thereto as by law provided. Costs may be in the cause, in view of the nature of the matter.

10. In response the petitioners/respondents filed both a preliminary objection and a replying affidavit. In the said preliminary objection, they raised the following issues:

1) THAT the application be dismissed for lack of competence as it's brought by a Purchaser and not a Dependant or a Beneficiary as the law of succession commands.

2) THAT this court does not have jurisdiction to hear and determine the alleged cause of action arising from alleged sale of land.

3) THAT the alleged cause of action is time barred.

4) THAT the alleged judgement is unenforceable due to limitation of time.

5) THAT the judgement alluded to is not signed by the Presiding Magistrate.

11. According to their replying affidavit, they are the administrators of the estate of the deceased. They took the view that the matter relating to the estate of the deceased was heard and determined and there is no pending claim by any dependants. It was their contention that the applicant's allegations of purchase can only have his dispute handled by the Environment and Land Court.

12. They stated that they are unaware of the existence of any suit known as Kilungu District Magistrate's Court Civil Suit No. 17 of 1991, and it's not shown at all that deceased was the one named in the said suit. According to them, the said suit does not show that the land parcel in issue is Plot Number 269 Kivani Adjudication Section. According to them the letter exhibited is a photocopy of another photocopy and cannot be relied upon; is not certified as true copy of the original by the court where it's said to have emanated; and is not in the hands of their father and the same is denied.

13. As regards the judgement they deposed that it is not an original record of the court but an uncertified photocopy with no seal of a court of law; it does not describe the land in question as Makueni/Kivani/269 or at all and neither does it show the acreage purportedly bought; was made on 30/5/1991 more than twenty eight (28) years ago and a decree has never been executed to date hence it lapsed in law under limitation of time; and was not signed by the Presiding Magistrate on the said date but was only certified as a true copy two years later in 1993. The Respondents also took issue with the fact that no statements of claim, the defence and the admission of any to put any claim to put any evidence to the claim were exhibited. It was contended that the claimant at the time ought to have pursued his or her claim through the adjudication process and any claim at this time is dead. They also stated that there is no sale agreement signed by their father as required by law or by his wife, the oldest son and the area chief as was required under Kamba Customary Law hence the Claim is fraudulent.

14. The Respondents disclosed that in fact, Makueni/Kivani/269 is 36 Acres and is where their father built his matrimonial home and to date, their mother and 2 of her sons cultivate and live there. While the deceased herein died in 1998 the applicant claims they had a judgment issued in 1991 and there is no evidence that they sought to enforce the same for more than 7 years when the deceased was alive. According to them, the applicant's claim is mischievous, miss-advised and an abuse of court process as the applicant lacks capacity to file this objection as he is not a dependant of the deceased.

15. In their submissions the Respondents reiterated the foregoing and contended that the Applicant cannot seek to enforce a judgment which is time barred since the alleged judgement was made on 30th May, 1991 more than twenty-eight (28) years ago. They relied on the decision of the Court of Appeal in the case of **Malakwen Arap Maswai vs. Paul Kosgei [2004] eKLR.**

16. Based on the foregoing it was submitted that it is clear that the alleged judgment is time barred thus the Applicant cannot seek to enforce it before this Court. To the Respondents, the Application is unmerited, an abuse of Court process and ought to be dismissed with costs.

Determination

17. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

18. Before going into the merits of the summons, it is contended by the Respondents that since the applicant is not a dependant of the deceased she has no *locus standi* in challenging the confirmation of grant. With due respect, this ground has no substance. Section 76(a), (b) and (c) of the *Law of Succession Act* provides as hereunder:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

19. It is therefore clear that any interested party can apply for revocation of a grant whether confirmed or not. The applicant herein has moved this court in her capacity as an administrator of the estate of a person who allegedly purchased part of the deceased from the deceased when the deceased was still alive. In the case of Johnson Muinde Ngunza & Another vs. Michael Gitau Kiarie & 12 Others (2017) eKLR, the Court stated that:

“[T]he Law of Succession Act recognizes the purchaser’s rights and in support of these submissions the said (sic) the Law of Succession defines a “Purchaser”. Purchaser according to the Act means a purchaser for money or money worth.”

20. In dealing with a similar matter, Makhandia, J (as he then was) in Titus Muraguri Warothe & 2 Others vs. Naomi Wanjiru Wachira Nyeri HCSC No. 122 of 2002 held that:

“In the instant case the applicants are purchasers for value of a portion of the deceased’s estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land to the applicants and he had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The respondent who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased, pursuant to the sale agreement and as required by law made an application to the Land Control Board for necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises...Had the applicants been made aware of the application for the confirmation by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of these interests. Further, had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is, therefore, the grant was obtained fraudulently by the making of a false statement and concealment from court of something material to the cause. The respondent knew of the applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for confirmation of the grant. In her distribution proposal she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with full knowledge of the respondent and since then they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years.”

21. Gikonyo, J in Simon Kamundi vs. Tabitha Gatiria Maingi & 3 Others [2016] eKLR where he opined as follows:-

“[9] Other than the consent discussed above, the circumstances of this case are that the purchasers herein bought the estate property from the personal representative of the estate. Such purchasers are entitled to defend their acquisitions in this cause especially now that revocation of the grant of representation pursuant to which they were sold the land has been sought and their acquisitions are being challenged too. Accordingly, although Section 93 of the Law of Succession Act has been invoked before it is appropriately applicable, but its purport is indicative that, a purchaser of the property of the estate from a person to whom representation has been granted should, of necessity, be a party in the cause where revocation is sought and transfers of estate property to him is being questioned. A decision on revocation application will invariably be a matter of direct concern to a purchaser of a property of the estate from a person to whom representation has been granted. As a matter of substantive justice, anything short of the above will be great injustice to confront a purchaser for value of the estate property with a decree which takes away his rights without his participation. It bears repeating that each case should be decided on its merit rather than making a hard and fast rule that all claims by third parties must be litigated in separate proceedings.”

22. Accordingly, the applicant has *locus standi* in bringing this application.

23. It was further contended that the issues raised by the applicant herein ought to be ventilated before the Environment and Land Court. However, as the above authorities show, a purchaser has the right to move the succession court where she alleges that a property in question does not belong to the estate of the deceased and therefore ought not to have been incorporated therein. Where her case is that her interests

have been ventilated and determined before a court of law competent to do so, as the applicant contends herein, he does not have to commence fresh proceedings before the Environment and Land Court and can rely on that determination to found her claim before a succession court. Accordingly, that objection, similarly fails.

24. In this case, the applicant's claim is a purchaser's interest. The main issue for determination here is whether the Certificate of Confirmation of Grant in respect of the Estate of the deceased herein incorporates a property that ought not to have been incorporated therein being LR No. Makueni/Kivani/269 formerly Plot Number 269 Kivani Adjudication Section.

25. According to section 3 of the *Law of Succession Act*, "estate" means "the free property of a deceased person" while "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by the time of his death, interests had not been terminated.

26. In Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR, the Learned Judge observed that:

"This Court's view before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution."

27. It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime, and in respect of which his interest had been terminated by his death cannot form part of his estate and cannot be the subject of an application for grant or confirmation thereof.

28. From the documents exhibited by the applicant, there is prima facie evidence that the deceased purchaser's interest was not taken into account during the confirmation of grant. If, as the applicant contends, the Respondents were aware or ought to have been aware of Ngila's interests in the estate of the deceased and proceeded to confirm the grant without disclosing that interest, such action amounts to concealment of a material fact. Regarding the issue of limitation, it is my view that if the applicant files a protest that is an issue that will be dealt with at that stage. It does not however, necessarily follow that in that event the grant must be revoked or annulled. In Re The Estate of the Late Suleman Kusundwa [1965] EA 247, it was held that:

"The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased's property as he was entitled to dispose of by will under the applicable law of inheritance."

29. As appreciated by Khamoni, J in Re Estate of Gitau (Deceased) [2002] 2 KLR 430:

"Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the Law of Succession Act should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them."

30. In the premises, I am satisfied that the grant herein was obtained and confirmed by the making of a false statement or by the concealment from the court of something material to the case and that further the same was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

31. Accordingly, the summons dated 2nd November, 2018 succeeds and the Confirmed Grant of Letters of Administration issued to **Rael Mbithe Muindi** and **Alex Nzuki Muindi** on 30th March, 2010 is hereby revoked. In effect only the distribution of the deceased's estate is reversed by this decision in order to pave way for the applicant to file a protest to the proposed distribution which protest is to be filed within 21 days of this decision.

32. I further direct that this dispute be referred to mediation for the purposes of proper distribution of the estate of the deceased.

33. There will be no order as to costs.

34. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 10th day of December, 2019.

G. V. ODUNGA

JUDGE

In the absence of the parties.

CA Geoffrey